
Alternative Dispute Settlement Regarding Investment in Some Asia Pacific Countries

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Abstract:

Every regional government effort in economics aims to provide welfare to the people, as well as investment opportunities in a legal attractive environment.

Hence, the business disputes become significant factors in regional investment, notably in Asia Pacific region that is now experiencing rapid economic growth. The question, however, is whether there is access for legal and trusted settlements for business disputes.

This study uses the qualitative method mostly used for legal issues on selected countries in the Asia Pacific region.

The results show that regional governments' capability to formulate policies related to dispute settlement in investments and to improve the quality of legal issues of business dispute settlements, in and outside the court is expected to have a significant role leading to a considerable increase in the investment level.

Keywords: Investment, dispute settlement, Asia Pacific region.

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1. Introduction

Domestic with direct foreign investment is the forefront of economic and business growth in the Asia Pacific region (Aggarwal and Urata, 2013; Petri *et al.*, 2012; Tiwari and Mutascu, 2011). In some cases, there are disputes in the business field among local investors, or between local and foreign investors (Park, 2012). In this context, there is an elegant way to resolve business and industrial disputes. Given the significant role of investments in economic and business growth it is naturally considered as an important factor in national economy (Fortanier, 2007; De Long and Summers, 1991; Borensztein *et al.*, 1998; Alfaro *et al.*, 2004)).

The study attempts to discuss some of the methods used in some Asian countries to resolve business disputes. The research questions are how Asian countries provide a legal certainty in solving the business dispute in or outside the court. To answer the research question, the study used the method of library research methodology. In this methodology, a number of documents related to the recorded-legal materials are analyzed in a qualitative way, to interpret the logical relation between the ipso facto and qualitative data based on related theories for the mentioned matters.

2. Mediation as a Mean to Resolve the Dispute in Investment

Dispute settlement is usually done with negotiation, mediation and arbitration (Goldberg *et al.*, 2014; Merrills, 2017; Lew *et al.*, 2003). Negotiation is the process of settlement which emphasizes a verbal communication in which the parties involved in a dispute resolve without the involvement of a third party as a mediator (Barry *et al.*, 2004). Both of these parties are not authorized to take decisions (mediation) (Moore, 2014), unless an authorized third party take a decision (arbitration, litigation) (Wälde, 2003). Arbitration is a dispute resolution process or dispute settlement that emphasizes communication between the parties involved in a dispute with the presence of an authorized third-party decision-making (Rokhmad, 2017).

Meanwhile, mediation is a dispute resolution process or dispute which emphasizes a verbal communication between the parties involved in a dispute without the involvement of a third party, but it is neutral and does not have the authority to decide besides facilitating dispute resolution processes based on local potential. Mediation is usually activated after a settlement with the way the negotiations being dead locked. Thus, the real dispute based on local potential requires the presence of a third party as a mediator (Bercovitch and Langley, 1993). Hence, this study would like to describe the concepts of mediation in some Asian countries. Five countries in Asia Pacific Region have been described by business consultants lenders and investors as the best places for foreigners to make investments.

3. Disputes Settlement in Some Asian Countries

3.1 Singapore

Cultural roots of mediation in Singapore as a form of conflict resolution and dispute settlement is an inherent fact of many cultures from inhabited tribes within the country (Velayutham, 2007). For this reason, mediation can be said to have been practiced in Singapore far before its founding. Singapore has its own Alternative dispute resolution/ADR movement (Teo and Aibinu, 2007), beginning in 1994 when the country's judicial and academic institutions began to promote mediation as a form of dispute settlement.

One of the hallmarks of Singapore that gave rise to the rapid appearance of mediation has been adopted as a conflict resolution forum into a unique culture. The natives were present at the time when the British first landed in Malaysia, was governed by Sultanate of Johor as an area developed by the British East India Company (EIC) being the key port of trade for immigrants coming from China, India and the neighboring areas.

The British decided to administer English common law system on the settlement under the second charter of justice of 1826 (Ahmad, 2012; Salim, 2006). The charter was sensitive to the culture dimensions in the area, due to several religions, manners, and usages of the native inhabitant culture. English law was imposed in civil and criminal matters but only cases which were brought to the attention of the courts of judicature. Within each cultural and religious group, indigenous means of conflict resolution is still prevailed. The extent to which mediation was practiced in pre-independence Singapore and in face mediation was provided in various cases. Several cases, some of the Chinese in Singapore still take place in tribe association activities. These tribes are created around Chinese from a common dialect group or province in China. Apart from formal tribe association, there are informal social groupings as occurred around the common cultures links. It takes place in Malay, Indian origins and Christian group as informal basis situated around the mosque, temple, and church.

Apart from the traditional cultural grouping, mediation also takes place with the communal context, particularly in smaller industrial areas or among close business association. Here, the cultural basis for the tendency to praise mediation can be traced back to traditional Asian inscrutability. Such traditions cause the parties in dispute to gravitate towards private settlement usually arranged by respected members of the industrial or professional association. The scope of commercial disputes is very broad, and disputes are unlikely to wish to divulge such information.

Moreover, Singapore has a very attractive system in doing business, particularly supported by low corruption (Ward *et al.*, 1995; Ghosh and Kwan, 1996). The system of judiciary regulates foreign companies in terms of mediation and arbitration to make transparent the contracts and decisions, and ensure that these matters will be effectively enforced.

3.2 Malaysia

In Malaysia, there is only one professional mediation centre established to date. This is the Insurance Mediation Bureau (IMB) which was established in 1991 and began operation in 1992 (Zhao and Nor Othman, 2011). It provides an independent and impartial method of resolving disputes between insurer-members of the Bureau and individual policy holders. The aim of IMB is to assist disputants to achieve resolution to disputes in a speedy manner with a very low cost involved. The IMB is self-related and addressed disputes special related to the insurance industry.

Another model of dispute resolution apart from mediation is conciliation. Although the law reform, specifically discuss the conciliation in private matter that is the Marriage and Divorce Act of 1976 providing for conciliation before divorce proceedings are instituted, for trade disputes the Industrial Relations Act 1967 provides conciliation proceedings by the Director-General of Trade Unions (section 18 and 19 of the Act). Both sections provide for the disputes to be referred to director-general who may then take steps to promote a settlement. The section also empowers the Directorate steps towards promoting a settlement regarding a trade dispute whether or not the dispute had been reported to the agency (section 18 (3)).

3.3 Hong Kong

Mediation is a consensus-based dispute resolution mechanism. China law provides three types of mediation through different authority and procedures, namely mediation by local governments, courts and bureau of Foreign Trade (BOFT). The status for mediation in counties, towns or cities was enacted to promote mediation by local governments as the preferred form of settling with minor disputes. Mediation by courts provided for in the Code of Civil Procedure, while the court mediation in the initiation is mainly upon the parties' consent. It is made mandatory prior as formal lawsuit of cases where an insignificant amount is involved or where the object matters fall within the scope of claims numerated in the code. Mediation through BOFT is aimed to solve foreign make dispute in a time fashion.

3.4 China

Mediation is the context of China system of dispute resolution. It has played a prominent role in both traditional and contemporary China. Most recently, it has been employed to deal with disputes arising from Chinese foreign business contracts. Mediation may be used as an independent method for dispute settlement or may be employed in combination with litigation or arbitration proceedings.

There are several ways to parties to resolve the settlement. First, ad hoc mediation as a method of Chinese-foreigner business contracts providing an ad-hoc mediation as a mean of revising a dispute before it is proposed to arbitration or adjudication by the court. In this case, the mediation may be conducted either in accordance with a

specific set of rules, such as the United Nations Arbitration Commission on International/trade Law (UNCITRAL) conciliation rule or in accordance with special procedures agreed upon the parties (Neuhaus, 1989). If the mediation is successful, a settlement agreement will be drawn up and signed by the parties. Under Chinese law, the settlement agreement is deemed to constitute a private contract.

Second, in some cases the parties may prefer the mediation to be conducted in a more formal setting. Two different types of mediation services have developed in recent years to deal with Chinese-foreigners business disputes. The first is mediation under the auspices' of the Beijing Conciliation Center and provisional-level conciliations guided by the Beijing conciliation Center. The second type is a joint conciliation carrying out in accordance with arrangements between the Chinese and the foreign dispute settlement.

Third, the Beijing Conciliation Center was established in 1987. The center maintained its own panel of conciliation of the Beijing Conciliations Center of the China Council for the Promotion of International Trade (China Chamber of International Commerce). Like ad-hoc conciliations, joint conciliations are a non-binding decision. In cases where the consolidation is successful, a settlement agreement or conciliation agreement will be drawn up, signed by parties and may be witnessed by the conciliators. Such agreements are not enforceable except as private contracts between the parties involved.

4. Conclusion

The results show that some countries in Asia Pacific Region use many methods of dispute settlement. The ADR methods are used to influence the attractiveness of foreign investors. Disputes settlement is usually done with negotiation, mediation, arbitration. In Singapore, the system of judiciary regulates foreign companies, in terms of mediation and arbitration, to make transparent the contracts and decisions ensuring that these matters will be effectively enforced. In Malaysia, there is the Insurance Mediation Bureau (IMB) as the only professional mediation body established to date. Moreover, for trade disputes, Malaysia regulates the Industrial Relations Act 1967 to provide conciliation proceedings to the Director-General of Trade Unions. In Hong Kong, the mediation can be done in the level of local governments, courts and bureau of Foreign Trade (BOFT). In China, there are at least three ways of dispute settlement, that are ad-hoc mediation, joint conciliation, and through the Beijing Conciliations Center.

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